James ACKERMAN d/b/a Iowa Missouri Construction Company, Plaintiff,
v.
P.M. LAUVER d/b/a Lauver DX Service, Appellee,
v.
IOWA MUTUAL INSURANCE COMPANY, Appellant.
No. 2-57645.
Supreme Court of Iowa

May 19, 1976

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1. Pleading-29
Amendments are the rule and denials the exception. 58 I.C.A. Rules of Civil Procedure, rule 88.

2. Pleading-236 (1)
Trial court has considerable discretion in allowing amendments. 58 I.C.A. Rules of Civil Procedure, rule 88.

3. Pleading-236 (2,4)
Amendments may be allowed at any time before the case is finally decided, even after completion of the evidence; but they should not be allowed after a responsive pleading has been filed, if they substantially change the issues. 58 I.C.A. Rules of Civil Procedure, rule 88.

[1,2] We first decide the issue raised by Lauver's late amendment. Amendments are the rule and denials the exception. The trial court has considerable discretion in allowing amendments. Rule 88, Rules of Civil Procedure; Atlantic Veneer Corp. v. Sears, 232 N.W. 2d 499,503, (Iowa 1974); Mora v. Savereid, 222 N.W.2d 417, 422 (Iowa 1974).

[3] Amendments may be allowed at any time before the case is finally decided, even after completion of the evidence; but they should not be allowed under Rule 88 after a responsive pleading has been filed, if they substantially change the issues. Atlantic Veneer Corp. v. Sears, supra, 232 N.W. 2d at 503; Smith v. Village Enterprises, Inc., 208 N.W. 2d 35,37-38 (Iowa 1973). The amendment belatedly asserted against Iowa Mutual by way of cross-petition the same claim for damages, both actual and exemplary, which Lauver had earlier made in his counterclaim against Ackerman.

DULASKY v. IOWA ILLINOIS GAS & ELECTRIC CO.

92 F. Supp. 118.....page 8

DULANSKY et al v. IOWA-ILLINOIS GAS & ELECTRIC CO.
Civ. No. 1-15.

United States District Court
S.D. Iowa, Davenport Division
June 30, 1950.

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17. Federal civil procedure-1681

The use of the word "denied" by one to whom requests for admissions have been made, in and of itself amounts to a specific denial of all of the affirmative facts set forth in the request, but when the word "denied' is qualified by a statement that the responding party does not have knowledge or information on which to for a belief, such a response is a nullity, since the legal effect is to

admit the facts contained in the request. Fed. Rules Civ. Proc. Rule 36 (a), 28 U.S.C.A.
See words and phrases, Permanent Edition, for the other judicial constructions and definition of "Denied".

18. Federal civil procedure-1681

The rule dealing with requests for admissions requires a absolute good faith and truthfulness in a response, and any responses which seek to evade or to avoid, short of a frank statement that the party cannot truthfully respond, stating the reasons or grounds therefore, will not be countenanced. Fed.Rules Civ. Proc. Rule 36 (a), 28 U.S.C.A.

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[17,18] This court is of the opinion, however, that the use of the word "denied" in and of itself does amount to a specific denial of all of the affirmative facts set forth in the request. When, however, the word "denied" is qualified by a statement that the responding party does not have knowledge or information upon which to form a belief, such a response is a nullity as the legal effect is to admit the facts contained in the request. The rule requires absolute good faith and truthfulness in a response and any responses which seeks to evade or avoid, short of a frank statement that the party cannot truthfully respond, stating the reasons or grounds therefore, will not be countenanced.

DUSSOUY v. GULF COAST INV. CORP.
660 F.2d 594 (1981) .....page 5

John W. DUSSOUY, Jr.
Plaintiff-Appellant,
v.
GULF COAST INVESTMENT CORPORATION,
Defendant-Appellee.
No. 80-3301.

United States of Appeals,
Fifth Circuit. *

Nov. 5, 1981
Rehearing Denied Dec. 2, 1981

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3. Federal Civil Procedure- 833
Policy of federal rules is to permit liberal amendment to facilitate
determination of claims on merits and to prevent litigation from
becoming a technical exercise in fine points of pleading. Fed. Rules
Civ.Proc. Rule 15(a), 28 U.S.C.A.

4. Federal Civil Procedure- 828
Unless there is substantial, reason to deny leave to amend pleading,
discretion of district court is not broad enough to permit denial. Fed.
Rules Civ.Proc. Rule 15(a), 28 U.S.C.A

Pg. 597 -598

[3,4] In our review of the trial court's exercise of discretion, rule 15(a) "Discretion" may be a misleading term, for rule, 15(a) severely restricts the judge's freedom, directing that leave to amend "shall be freely given when justice so requires". 56 evinces a bias in favor of granting leave to amend.

The policy of the federal rules is to permit liberal amendment to facilitate determination of claims on the merits and to prevent litigation from becoming a technical exercise in the fine points of pleading. See, e.g., Foman v. Davis, 371 U.S. at 182,83 S. CT. at 230, 9 L.Ed.2d at 225-26; Conley v. Gibson, 355 U.S. 41,48,78 S.Ct. 99,103, 2 L. Ed.2d 80, 86 (1957); Sherman v. Hallbauer, 5 Cir. 1972, 455 F.2d 1236, 1242. **Thus, unless there is a substantial reason to deny to amend, the discretion of the district court is not broad enough to permit denial.** See Lone Star Motor import v. Citroen Cars, 5 Cir. 1961, 288 F.2d 69, 75.

GRIFFITH V. WAINWRIGHT
772 F.2.D 822 (1985)
..... page 7

Jack Griffith, Plaintiff-Appellant
v.
Louie L. WAINWRIGHT, et al.,
Defendants-Appelles.
No. 85-3001
Non-Argument Calendar.

United States Court of Appeals,
Eleventh Circuit.
Sept. 30, 1985

Page 822
1. Federal Civil Procedure
Summary judgment cannot be entered against party unless that person had been given express notice, ten days in advance, of his rights under rule 56(c) and how he might best defend them. Fed. Rules Civ. Proc. Rule 56(c), 28 U.S.C.A.

Page 823
2. Federal Civil Procedure
Adverse party must be given express, ten-day notice of summary judgment rules, of his right to file affidavits or other material in opposition to the motion, and of consequences of default; that done, district court may properly take motion under advisement as of a day certain and may rule on motion consistent with dictates of procedural fairness required by Rule 56. Fed. Rules Civ. Proc. Rule 56(c), 28 U.S.C.A

Page 824

[1] Although this case come before us in the posture of a First Amendment case, we find it unnecessary to reach the question of whether the Appellant here stated a meritorious claim on the constitutional question. Instead, we are compelled by our own precedents to note sua sponte that the court below failed to adhere to the dictates of Fed. R.Civ. P. 56(c), which rule requires that summary judgment cannot be entered against a party unless that person has been express notice, ten days in advance, of his rights under that rule and how he might best defend them. 3

Page 825

[3] While it is well settled in this Circuit that this requirement does not of necessity require that such notice be given at an oral hearing, Moore, 703 F. 2d at 519, our jurisprudence requires at least this: that an adverse party must be given express, ten day notice of summary judgment rules, of his right to file affidavits or other material in opposition to the motion, and of the consequences of default. That done, the court may properly take the motion under advisement as of a day certain and may rule on the motion consistent with the dictates of procedural fairness required by Rule 56. Moore, 703 F. 2d at 519; Kibort v. Hampton, 538 F. 2d 90,91 (56th Cir. 1976).

HERRON V. BECK
693 F. 2d 125 (1982)

Vicel HERRON, Plaintiff-Appellant,
v.
James G. Beck, J.J. Culpepper, Sgt. Wheeler and Robert Holmes,
Defendants-Appellees.

No. 80-7727

United States Court of Appeals,
Eleventh Circuit.

Dec. 6, 1982

Page 126-127
Federal Civil Procedure-937 Where district court failed to comply with ten-day notice requirement of summary judgment rule in entering summary judgment against pro e litigant who challenged the removal of legal and educational materials from his jail cell, judgment would be reversed and remanded. ; 42 U.S.C.A. & 1983; Fed. Rules Civ. Proc. Rule 56(c), 28 U.S.C.A

[1] It is well established in this circuit that the ten-day notice requirement of Rule 56(c) 1 is strictly enforced. See, e.g., Hickey v. Arkla Industries, Inc., 615 F.2d 229,240 (5th Cir. 1980) (holding that "where the motion to dismiss is converted into a motion for summary judgment, the notice and hearing requirements of Fed. R. Civ. P. 12(b) and 56 (c) must be followed"); Underwood v. Hunter, 604 F.2d 367, 369 (5th Cir. 1979) (citing numerous former Fifth Circuit cases which have upheld "the

strict notice and hearing requirements...where the court sua sponte converts a 12(b)(6) motion into a summary judgment motion by considering matters outside the pleadings"). 2 Moreover, a court should be particularly careful to ensure proper notice to a pro se litigant. See Davis v. Zaharadnick, 600 F.2d 458, 460 (4th Cir. 1979) (holding that "before a motion for summary judgment is granted, the pro se plaintiff must be advised of his right to file counter affidavits or other responsive material and that he be alerted to the fact that his failure to so respond might result in the entry of summary judgment against him...In addition, the ...notice must be sufficiently clear to be understood by a pro se litigant and calculated to apprise him of what is required under Rule 56.

JOHNSON V. ZERBST,
WARDEN..... page 9,10

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
FIFTH CIRCUIT.

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2. This right may be waived; but the waiver must be an intelligent one; and whether there was such must depend upon the particular facts and circumstances, including background, experience, and conduct of accused. P. 464.

Page 464

Two. There is insistence here that petitioner waived this constitutional right. The District Court did not so find. It has been pointed out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not presume acquiescence in the loss of fundamental rights". A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right of counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

JONES V. LAUGHLIN STEEL
750 F.2d 1214 (1985)
..... page 9

Alex JONES, Appellant,
v.
JONES & LAUGHLIN STEEL
CORP., Appellee.
No. 83-5840.

United States Court of Appeals,
Third Circuit.

Argued Sept. 10, 1984
Decided Dec. 28, 1984.

Page 1214
1. Federal Civil Procedure-840, 1272
In employee's race discrimination suit against employer, district court exceeded limits of sound discretion in denying employee's motions, filed when employee, who had filed the action per se, succeeded in retaining counsel after period for discovery had expired, for leave to file amended complaint and for extended period of discovery since employee acted diligently and in good faith to obtain counsel, and since employer did not allege that it would be prejudiced if the court granted the motion to file an amended complaint, and did not contest motion to extend the period for discovery. Civil Right Act of 1964, &701 et seq., 42 U.S.C.A. &2000E ET SEQ.; 42 U.S.C.A. & 1981.

Page 1215
2. Federal Civil Procedure- 2497

In employee's race discrimination suit against employer, genuine issues of material fact existed as to whether it was employer's policy not to post job openings or to specify qualifications for particular position, precluding summary judgment. Civil Right Act of 1964, &701 et seq., 42 U.S.C.A. &2000E ET SEQ.; 42 U.S.C.A. & 1981.

[1] For the reasons we articulate in Howze v. Jones & Laughlin Steel Corp., supra, we conclude that the district court exceeded the limits of sound discretion in denying Jones leave to file an amended complaint and to extend the period for discovery.

[2] In granting summary judgment J & L, the district court held that Jones had not established a prima facie case under Title VII because he had "not shown to which jobs the younger, white employees were promoted, nor what qualifications the defendant company considered for any job promotion." App. At 192a. Jones alleges, however, that is it the policy of J & L not to post job openings or to specify the qualifications for a particular position. Hence, Jones' only recourse to obtain such information was through the discovery process. We believe that Jones is entitled to a reasonable period in which to conduct discovery with the assistance of counsel.
The district court further concluded that there was "no evidence in support of a & 1981 claim." App. at 192a. Assuming, without deciding, that J & L would otherwise be entitled to summary judgment on this bias, we will nevertheless vacate the order granting summary judgment because our ruling reopening discovery may present a different record for the court's consideration.

LEVALD, INC. V. CITY OF PALM DESERT
998 F.2D 680 (9TH CIR.1993).....page 3

LEVALD INC., Plaintiff-Appellant,
v.
CITY OF PALM DESERT,
DEFENDANT-APPELLE.
No. 91-56315.

United States Court of Appeals,
Ninth Circuit.

Argued and submitted Feb. 4, 1993.
Decided July 8, 1993.

Page 683
23. Federal Courts- 817
District court's denial of plaintiff's request to amend its complaint is reviewed for abuse of discretion. Fed. Rules Civ. Proc. Rule 15(a), 28 U.S.C.A.

Page 691
[23] A district court's denial of plaintiff's request to amend its complaints pursuant to Federal Rule of Civil Procedure 15(a) is reviewed for abuse of discretion. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321,330,91 S.Ct. 795,802,28 L. Ed 2d 77 (1971). "A court is within its discretion to refuse amendment and dismiss the complaint if it 'concludes that the pleading as amended could not withstand a motion to dismiss.'" Hoover v. Langston Equip. Assoc., Inc, 958 F.2d 742,745, (6th Cir. 1992) (citation omitted). **However, the "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of Federal Rules."** Foman v. Davis, 371 U.S. 178,182, 83 S.Ct. 227,230,9 L.Ed.2d. 222 (1962).

MILBURN v. UNITED STATES
734 F. 2d 762 (1984) .....page 7

William R. Milburn and Richard V. Thompson,
Plantiffs-Appellants,
v.
The United States of America,
Defendant-Appellee.

No. 83-5248.
United States Court of Appeals,
Eleventh Circuit.

June 18, 1984

Page 763
7. The Eleventh Circuit strictly enforces ten-day notice requirements of Federal rule of civil procedure governing service of summary judgment motions. Fed. Rules Civ. Proc.Rule 56 (a), U.S.C.A.

8. District court erred in not giving litigants ten-day advance notice that it would take Government's summary judgment motion under advisement as of certain date. Fed. Rules Civ. Proc.Rule 56 (a), U.S.C.A.

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[6,7] It is well settled in this circuit that Rule 56(c) does not require and oral hearing. "Rather, 10-day advance notice to the adverse party that the motion and all materials in support of or in opposition to the motion to the motion will be taken under advisement by the trial court as of a certain day

satisfies the notice and hearing dictates of Rule 56." Moore v. Florida, 703 F.2d 516, 519 (11th Cir. 1983) (emphasis added), citing Barker v. Norman, 651 F. 2d 1107m 1119 (5th Cir. 1981); Capital Films Corp. v. Charles Fries Productions, 628 F.2d 387, 391-92 (5th Cir. 1980); Kibort v. Hampton, strictly enforces the 10-day notice requirement for all litigants.

MIRANDA V. ARIZONA
384 U.S. 436..... page 10

MIRANDA V. ARIZONA
CERTIORARI TO THE SUPREME COURT OF ARIZONA.
No. 759. Argued February 28-March 1,1966
Decided June 13, 1966

Page 436
This court always set high standards of proof for the waiver of constitutional rights, Johnson v. Zerbst, 304'U.S. 458 (1938), and we re-assert there standards applied to in-custody interrogation.

Page 475
"Presuming waiver from a silent record is impermissible: The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer, Anything less is not waiver."

PALKO V. CONNECTICUT. 302 U.S., 319..... page 11

PALKO v. CONNECTICUT.

APPEAL FROM THE SUPREME COURT OF ERRORS OF CONNECTICUT.

Page 327

Fundamental too in the concept of due process, and so on in that liberty, is the thought that condemnation shall be rendered only after trial. Scott v. McNeal, 154 U.S. 34; Blackmer v. United States, 284 U.S. 421. The hearing, moreover, must be a real one, not a sham or pretense. Moore v. Dempsey, 261 U.S. 86; Mooney v. Holohan, 294 U.S. 103. For this reason, ignorant defendants in a capital case were held to have been condemned unlawfully when in truth, though not in form, they were refused the aid of counsel. Powell v. Alabama, supra, pp. 67,68. The decision did not turn upon the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a federal court. The decision turned upon the fact that in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing.

POWELL V. ALABAMA 287 U.S. 45..... page 9

OZIE POWELL, WILLIE ROBERSON, ANDY WRIGHT, AND OLEN MONTGOMERY V. ALABAMA
HAYWOOD PATTERSON V. SAME.
CHARLEY WEEMS AND CLARENCE NORRIS V. SAME

Page 68-69

What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks bother the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of

feeble intellect. If in any case, civil or criminal, a state or federal couth were arbitrarily to refuse to hear a party by counsel, employed by appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

SARTOR et.al. v. ARKANSAS NATURAL GAS CORPORATON,321 U.S. 620..... page 5

SARTOR et.al. v. ARKANSAS NATURAL GAS CORPORATON,
No. 232
Argued Feb. 3, 1914.
Decided March 27, 1944.
Rehearing Denied April 24, 1944.

Page 725

5.Courts-354
Federal rule providing for summary judgment was not intended to cut off right of trial by jury where there are issues to try, and summary judgment should be granted only when moving party is entitled to judgment as a matter of law, the truth is quite clear and not genuine issue remains for trial. Federal Rules of Civil Procedure, rule 56(c), 28 U.S.C.A. following section 723c.

10. Courts-354
Affidavits of interested experts, whose opinions jury refused to follow at previous trial, that market price at well of gas produced under mineral leases providing for calculation of gas royalties...did not conclusively establish that market price of gas at well did not exceed 3 cent so as to justify summary judgment that lessors who had received 3 cent per m.c.f. for royalties.

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[5] The Court of Appeals below heretofore has

correctly noted that Rule 56 authorizes summary judgment only where the moving party id entitled to judgment as a matter lf law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try. In the very proper endeavor to terminate litigation before it for the fourth time, we think it overlooked considerations which make the summary judgment an inappropriate means to that very desirable end.

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[10] We think defendant failed to show that it is entitled to judgment as matter of law. In the stipulation, the bulletin, the affidavit of the plaintiff's attorney and the admission of it's witnesses, there is some, although far from conclusive, evidence of a market price or a value, under the rules laid down by the Court of Appeals, that supports plaintiffs' case. It may well be that the weight of the evidence would be found on a trial to be with defendant. But it may not withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony. And their credibility and the weight to be given to their opinions is to be determined.

SIEB'S HATCHERIES, Inc. v.
LINDLEY et al.
Civ. A. No. 1026.

United States District Court
W.D. Arkansas, Fort Smith Division.
Sept. 30, 1952

Page 114
2. Federal Civil Procedure-1676, 1691

The Federal Rules of Civil Procedure are binding upon the parties and the courts regardless of the views of individual judges administering them. Fed.Rules Civ. Proc. Rules 6(b), 36,28 U.S.C.A.
Page 119
[2] The Federal Rules of Civil Procedure are binding upon the parties and the courts, regardless of the views of individual judges administering them. Westland Oil Co. v. Firestone Tire & Rubber Co., D.C.N.
d., 3 F.R.D 55; Beasley v. United States, supra; Barrezuetta v. Sword S.S. Line, Inc., D.C.S.C.N.Y., 27 F.Suupp. 935. In Holt v. Werbe, 198 F.2d 910,the court for the Eight Circuit, by Judge Riddick, said: "The Rules of Civil Procedure are not advisory merely." In Canister Co. v. Leahy, 3 Cir.,182 F.2d 510, at page 514, the Court said: "The rules are rules of procedure. They must be adhered to." McCullough v. Cosgrave, Judge, 309 U.S. 634, 60 S.Ct. 703, 84 L.Ed. 992, was a petition for mandamus to compel the trial judge to try certain cases without referring them to a Master. The facts showed a persistent disregard of the rules and the writ was issued.

STATE OF WASHINGTON V. MARICOPA COUNTY
143 F. 2D 871

STATE OF WASHINGTON et. Al. v. MARICOPA COUNTY et. al.
No. 10493
United States Court of Appeals,
Ninth Circuit.
June 30, 1944

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Thus, instead of showing that there was no genuine issue as to any material fact, the pleadings showed that there were such issues. The affidavits showed nothing to the contrary. One of the supporting affidavits contained statements made on information and belief. These statements should have been disregarded. Each of the supporting affidavits contained statements of legal conclusions. 3 These, too, should have been disregarded. Numerous papers were referred to in each of the supporting affidavits. No sworn or certified copy of any such paper was attached to or served with either affidavit. Hence, all references to such papers should have been disregarded. We conclude that the motion for a summary judgment was not well founded and should have been denied. Judgment reversed and case remanded for further proceedings.